IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1273 OF 2004
IN
EXECUTION APPLICATION NO.145 OF 2004
IN
SUM.SUIT NO.3690 OF 2000

Mohammad Nabi Khan @
Mohamad T.Khan. ..Plaintiff.

V/s.

Quba Enterprises & Ors. ..Defendants.

And

Swapna Surabi Co-op.Housing
society(proposed) ..Applicants.

Mr.A.A.Joshi i/b B.G.Saraf for applicants.

Mr.Girish Desai with Ms.Geeta Shastri i/b
S.P.Srivastav for Plaintiff.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 3, 2005.

P.C. :

1. Heard counsel for the parties. Perused the pleadings.

2. The issue that arises before this court in the present chamber summons is whether the the order of attachment passed on 19th July, 2004, in respect of the buildings situated at survey No.331 Hissa No.2C, CTS No.5044C at village Kolekalyan, Taluka Andheri, Mumbai 400 098 can be allowed to continue.

3. According to the applicants, who are third party to the suit between the plaintiff and defendants, they are the owners of the structure standing on Survey No.331 referred to above. They have constructed the said structure on the subject land at their risk and expenses in terms of the articles of agreement made and entered into on 18th January, 2001 between M/s. Quba Enterprises, the assigners and Mr. M.R.Thaware, the confirming party. The assigner and third party agreed that entire development work in respect of the said property was to be carried out by the applicants in accordance with the plans to be sanctioned by the Municipal authority. Clause (6) of the agreement between parties provides that the applicants shall be entitled to enter into agreements for sale or allotment of flats, shops and other premises in the building/s to be constructed by them on the said property. Besides, the applicants shall remain liable and responsible for such agreement executed by them and the assignor shall not be party to such agreements. In short, the case of the applicants is that they are the owners of the structure in question, which has been attached in terms of the order dated 19th July, 2004. According to the

applicants, Judgment Debtors have no concern with the said structure neither they have spent any amount for construction of the said structure/building nor were they entitled to flats or shops, other premises in the suit building. Other rights were exclusively available to the applicant society under the agreement. On this basis it is asserted that the attachment in respect of building which has been constructed by the applicants cannot be continued.

4. In support of this submission, reliance is placed on the order passed by this court between the parties dated 18th April, 2002 in Notice of Motion No.3024 of 2001 to contend that similar attempt of attachment of the building was made by the plaintiff, before the decree was passed in the suit building between the plaintiff and defendants which has been answered against the plaintiff taking the view that the development rights in the building belong to the applicants herein and the defendant No.1 had no concern with regard to the construction of building or dealing with the flats, shops or premises to be so constructed.

5. Counsel for the Judgment Creditor/plaintiff however, contends that the attachment has been

properly made and there is no reason to interfere with the said order. According to him, the Judgment debtor has right, title and interest in the land bearing Survey No.331. The applicants cannot be heard to contend that structure standing on the said land cannot be attached in execution of the decree passed against the Judgment Debtors in summary suit for recovery of certain amount. It is contended that there is no valid transfer in favour of the applicants and if it is so, it will have to be assumed that the structure standing on the land bearing surve No.331 belongs to the Judgment debtors. It is further submitted that the applicants are relying on development agreements and it is well settled that there can be no specific performance of such agreement, at best there can be suit for damages. Counsel for the plaintiff has relied on the decision in the case of Gurudev developers V/s. Kurla Konkan Niwas Co-op.Hsg.Society., 2000(3) MLJ 131 to support above contention. On the above submissions, counsel for the plaintiff contends that there is no substance in the present chamber summons.

6. Having considered rival submissions and going through the pleadings and documents placed before this court, I have no hesitation in taking the view

that the agreement executed in favour of the applicants dated 18th January, 2001, entitles the applicants to construct building on the suit land on their own risk and expenses, with further right to deal with the flats, shops and other premises in the building to be so constructed. Under the said agreement, Judgment debtor has no right whatsoever, with regard to the flats, shops and other premises to be constructed by the applicants. It is well settled that there can be ownership of structure which is independent of ownership of land. The applicants before this court has not at all asserted any right or ownership with regard to the land which was originally owned by one Ms.Louisa Mary D’Souza. The applicants however, have confined their claims only to the structure which has been constructed, erected by them at their risk and expenses. Viewed in this perspective, there is substance in the claim of the applicants that Judgment creditor could not have proceeded against the structure which was owned and possessed by the applicants. Remedy of the Judgment creditor was available only against the Judgment Debtor, in respect of the properties belonging to Judgment Debtor, whether movable and immovable. The structure incidentally standing on the land in which Judgment debtor asserts right in terms of development

agreement executed by the original owners in favour of the defendant No.1. However, that will make no difference to the claim of the applicants which is confined to the structure standing on such land as these are independent claims. I am not impressed by the argument canvassed on behalf of the Judgment creditor that there is no valid transfer in favour of the applicants and that it should be assumed that the structure is also owned and possessed by the Judgment debtors. It is not necessary for me to go into the wider controversy whether Judgment debtor has already acquired complete right in respect of the disputed land, so as to decide the limited controversy in the present application. Suffice it to observe that the defendant No.1 has executed agreement to which Mr. Thaware is affirming party. That agreement bestows right on the applicants to construct structure on the land and to deal with the same in the manner permitted by law. Besides, the applicants have already taken steps for registration of the society, for registering conveyance in favour of the society. The applicants have already moved Administrator General, Maharashtra State, which in turn has passed an order on 10th April, 2003, whereas the decree against the Judgment debtor has been passed only on 9th January, 2004. Be that as it may, it is not

possible to accept the argument that it should be assumed that the structure is also owned and possessed by the Judgment debtors inspite of the agreements dated 18th January, 2001 in favour of the applicants. The parties have acted on the said agreements and the applicants have not only paid the entire amount under the agreement to the Judgment Debtor as well as the third party Mr. Thaware, but also incurred expenses for constructing the building on their own. The Judgment Debtor in that sense has no connection with the erection of the structure which is sought to be attached for the execution of decree against the Judgment debtor.

7. Viewed in this perspective, the decision pressed into service on behalf of the Judgment creditor in the case of Gurudev Developers is of no avail. For the reasons mentioned earlier, in my opinion, the suit structure which is sought to be attached in terms of order dated 19th July, 2004 is owned and possessed by the applicants and that the Judgment Debtors have no claim therein whatsoever. This is so because, the applicants have already parted with the entire amount under the agreement to the Judgment debtor. In fact, the case of the applicant is that they have spent much more amount

than what was expected under the agreement. They have incurred expenses which were required to be incurred by the Judgment Debtor under the agreement. It is not necessary for me to elaborate those matters. It is seen that in fact the applicant has already sold substantial number of flats to third parties for consideration who in turn have become member of the applicant society. Be that as it may, for the view I have already taken, suffice it to observe that the Judgment debtor is neither owner of the structure nor has any right in the said structure. If it is so, it is not open to the Judgment creditor to proceed against the said structure standing on survey no.331. Accordingly, the order of attachment cannot be allowed to continue.

8. Besides, there is substance in the submission canvassed on behalf of the applicant that it was not open to the Judgment creditor to attach the subject structure, especially when similar relief claimed on the earlier occasion during the pendency of suit between the plaintiff and defendants was rejected by this court on 18th April, 2002. Counsel for the Judgment creditor however, contends that the observations made in the order dated 18th April,

2002, were only at the interlocutory stage and that will not preclude Judgment creditor to proceed against the said structure inspite of the rejection of similar relief on the earlier occasion before the decree was passed. I find no substance in this submission. Merely because the order was interlocutory, the reason which has been mentioned for refusing the attachment as prayed by the Judgment creditor on the earlier occasion in order dated 18th April, 2002 clearly finds that the defendant No.1 had no right in the subject structure. That finding has been allowed to be become final. Be that as it may, for the reasons already recorded by me, this chamber summons ought to succeed and the same is allowed in terms of prayer clause (a) and (b). Ordered accordingly.

9. At this stage, the counsel for the Judgment creditor prays that the applicants be directed to maintain status quo with regard to the unsold flats so as to enable the Judgment creditor to take the matter in appeal, if so advised and seek appropriate relief, as may be advised. This prayer is opposed by the counsel for the applicant. In my opinion, however, in the interest of justice, the applicants are directed not to create any third party interest

in the unsold flats in the building till September 8, 2005.